(3)

Nos. 90-6588 and 90-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAKE AYERS, JR., *et al.*,

and

UNITED STATES OF AMERICA,

Petitioners,

vs.

RAY MABUS, GOVERNOR,
STATE OF MISSISSIPPI, *et al.*

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
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The NAACP Legal Defense and Educational Fund, Inc. (LDF) respectfully moves the Court for leave to file the

attached brief as *amicus curiae* in support of the petitions for writs of *certiorari* to the United States Court of Appeals for the Fifth Circuit. Both the Ayers petitioners and the United States have consented to the filing of this brief. Respondents, Ray Mabus, Governor of the State of Mississippi, *et al.*, have denied consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist black citizens in securing their rights under the Constitution. LDF has significant interests in this litigation. LDF has litigated extensively in the area of school desegregation.* It litigated the five cases whose interpretation is directly involved in determining a state's obligation to dismantle a formerly *de jure* segregated system of higher education -- the central issue raised in these petitions.

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* Further description of the interests of *amicus* LDF appears at pages 2-5 of the attached brief, including a description of LDF's history of involvement in school desegregation litigation.

LDF believes that the decision entered below is in error and will have substantial adverse effects on the educational opportunities for black citizens that LDF's litigation seeks to expand. Because of the direct effect on LDF's litigation efforts and LDF's extensive involvement in the development of the law in this area, LDF's participation as *amicus curiae* in this case will be of assistance to the Court.

Respectfully submitted,

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Interest of the NAACP Legal Defense Fund As *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc.

(LDF) is a non-profit corporation established to assist African

American citizens in securing their constitutional and civil rights. LDF historically has had and continues to have a major role in litigation efforts challenging discrimination and segregation in education.[1]

The interests of LDF are significant in this case. LDF successfully litigated the first court challenge to racial segregation in Mississippi's higher education system, *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962). The central question presented here regarding the scope of a state's duty to desegregate a formerly

[1] *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954). LDF represented the plaintiffs in the litigation that resulted in the initiation of desegregation efforts in public higher education systems in 18 states, including the State of Mississippi. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). Other LDF higher education desegregation cases include: *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Adams v. Lucy*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

de jure segregated system of higher education involves the interpretation of five cases litigated by LDF.[2]

As a result of litigation brought by LDF,[3] in 1978 the Office for Civil Rights of the United States Department of Health, Education and Welfare (HEW)[4] promulgated remedial standards for desegregating formerly *de jure* state systems of higher education pursuant to the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The "HEW Guidelines" imposed an "affirmative duty to take effective steps to eliminate the *de jure* segregation," and required "more than mere abandonment of discrimination

[2] *Bazemore v. Friday*, 478 U.S. 385 (1986); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986); *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368 (E.D. Va.), *aff'd mem.*, 404 U.S. 907 (1971); and *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969).

[3] *Adams v. Richardson*, *supra* note 1.

[4] The Department of Education subsequently was substituted for HEW in the litigation.

through the state's adoption of passive or race neutral policies."[5]

Under these standards, as well as decisions of several federal courts, progress toward equal opportunities in higher education for African Americans began to be made. Some states moved not just to open the doors of formerly white institutions, but also took gradual steps to enhance their long-neglected and under-funded historically black colleges, which continue to educate a substantial portion of black college students.[6]

This litigation marks the first time that the Court of Appeals for the Fifth Circuit *en banc* has considered the duty owed by formerly *de jure* states in higher education. Instead of requiring the progress that has occurred elsewhere,

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[5] Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (Feb. 15, 1978) reprinted in the Ayers Petitioners' Appendix ("Ayers App.") A90.

[6] *Id.* at 6660, Ayers App. A92.

however, the decision in *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (*en banc*), effectively cuts off the desegregation process. The court below requires only that formerly *de jure* segregated state systems of higher education implement what are described as good faith, race-neutral policies. In so holding the court ignored the massive overlay of entrenched disadvantage and inequity caused by the vestiges of the prior, overtly dual system and the consequent continued existence in Mississippi, in practice if not in theory, of the dual system.

Because of the important goal of providing full educational opportunity for African American citizens free from the vestiges of past discrimination and segregation, LDF urges the Court to grant the pending petitions for *certiorari* in order to reverse the *Ayers* decision.

STATEMENT OF RELEVANT FACTS[7]

Opportunities for higher education for freed slaves and their descendants following the Civil War were first provided in Mississippi in 1878, when the Mississippi State Legislature designated Alcorn Agricultural and Mechanical College for the education of black youth (United States' Appendix "U.S. App." 110a-11a). Since 1844, the State had operated the University of Mississippi, which was solely for white persons. The same year that Alcorn was designated for African Americans, the state established Mississippi Agricultural and Mechanical College (later Mississippi State University) for white persons only.

Thereafter, the State established the Mississippi University for Women for whites in 1884, the University of Southern Mississippi for whites in 1910, Delta State

[7] We adopt the detailed factual review provided by the Ayers petitioners.

University for whites in 1924, Jackson State University for the training of black teachers for black public schools in 1940, and Mississippi Valley State University for the training of black teachers and for vocational training for black students in 1946.[8]

That funding and support for the institutions dedicated for the education of African Americans was grossly inferior to that for whites is undisputed.[9] That this severely and adversely affected the quality of life for Mississippians of African descent is admitted by the State.

[8] U.S. App. 109a-114a.

[9] U.S. App. 65a-66a, 151a-52a; Bureau of Education, United States Department of the Interior, *Survey of Negro Colleges and Universities* 416-17 (1928) (Alcorn A & M "is largely a school of preparatory grade, concentrating its efforts on vocational and manual training. . . . [It] is lacking a properly qualified teaching staff and educational equipment for standard college work."). For a review of the grossly disparate funding provided public institutions for blacks during the "Jim Crow" era and thereafter *see also generally* Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987); W.E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954* (University Microfilms International, Ann Arbor, Michigan 1979); Payne, *Forgotten . . . but not gone: The Negro Land-Grant Colleges*, Civil Rights Digest 12 (Spring 1970).

> [W]hen the 1945 survey was made there were 22 times as many white doctors in Mississippi in proportion to the white population as Negro doctors in proportion to the Negro population; 13 times as many dentists, 5 times as many pharmacists, 420 times as many lawyers, and 40 times as many social workers.
>
> . . .
>
> From 1948-1953, the institutions for white students in the State conferred 14,205 degrees, one for every 131.1 white persons in the population; whereas the colleges for Negroes conferred 1,268 degrees, or one for every 778.1 Negroes in the total population.[10]

In 1980, African Americans comprised 35.4 percent of the total population of Mississippi, and 41.3 percent of all person ages 16-21 in the State (Ayers App. A113-117). Nonetheless, in 1984-85, African Americans received 23.9 percent of all undergraduate degrees and 20.6 percent of graduate degrees. Only 4.4 percent of the law degrees awarded during the period 1982 to 1986 went to African Americans. Of the medical and dental degrees awarded in

[10] "Higher Education in Mississippi," Board of Trustees of State Institutions of Higher Learning of the State of Mississippi (Ayers App. A102-04).

1985-86, only 4.5 percent went to African Americans. (Ayers App. A179-204.) The poverty rate for African Americans in Mississippi in 1980 was 44.4 percent compared to 12.6 percent for whites (Ayers App. A114-116).

Educational opportunities for African Americans in Mississippi today are directly reflective of and limited by Mississippi's history of race discrimination and segregation in its education system.[11] Today, African American students continue to be channelled systematically to the historically black institutions,[12] and pursuant to "mission designations"

[11] Disparities in the quality of the educational offerings at historically black institutions (HBIs) and historically white institutions (HWIs) are well documented and continue at every level as proved at trial: level of faculty education (U.S. App. 55a); faculty salaries (U.S. App. 56a), program offerings (U.S. App. 57a-61a); funding (U.S. App. 66a); and facilities (U.S. App. 68a). These inequities in higher education simply extend the inequities spawned in Mississippi's longstanding dual system at the elementary and secondary level of education. *See, e.g., United States v. Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), *delaying order reversed sub nom. Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

[12] Shortly after the court ordered the admission of James Meredith to the University of Mississippi in 1962, the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi and the HWIs adopted a new admissions requirement of a score of 15 on the ACT, a

(continued...)

tied directly to prior inequities resulting from overt discrimination, financial support continues to be channelled disproportionately to the historically white institutions.[13]

Thus, hardly a dent has been made in Mississippi's entrenched racial caste system in higher education.[14] Yet the Court of Appeals for the Fifth Circuit ruled that Mississippi need do no more than adopt good faith, race-neutral policies,

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[12](...continued)
standardized college admission examination. The purpose of this change was to deter black enrollment. (U.S. App. 51a.) Despite strong evidence that the ACT should not be used as the sole criterion for admission and the existence of better predictors of success in college with less adverse effect on black students, the HWIs continue to rely exclusively on the ACT. Racially identifiable student enrollments (U.S. App. 50a-51a) and racially identifiable faculties (U.S.App. 56a), continue to correspond strongly with the original racial designation of each institution.

[13] The *en banc* court found that the "mission designations had the effect of maintaining the more limited program scope at the historically black universities," (U.S. App. 31a), and that "the disparities are very much reminiscent of the prior system. The inequalities among institutions largely follow the mission designations" (U.S. App. 37a). See also U.S. App. 66a.

[14] Mississippi is among the states most recalcitrant to higher education desegregation efforts, requiring the United States to sue the state for its failure to adopt adequate desegregation measures. The desegregation plan adopted by the state has always been under-funded (U.S. App. 58a).

irrespective of results.[15] Mississippi is not required to take affirmative measures to correct its wrong; black citizens are not entitled to an effective remedy.

SUMMARY OF THE ARGUMENT

This is a case of tremendous importance. Higher education has increasingly become the key to breaking the cycle of poverty, gaining full employment in the growing technical and highly skilled workforce, and developing healthy, responsible and productive communities. Equal access to this education free from the burdens and limitations of past and present discrimination and segregation is essential if African Americans are to enjoy the full rights and privileges to which all citizens are entitled.

This Court should grant the petitions for writ of *certiorari* because of the conflict in the circuits regarding the

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[15] U.S. App. 2a.

duty to correct state-mandated, separate and inferior educational systems for blacks, the broad impact of the case, the legal error committed below, and the real and substantial harm caused if the *Ayers* decision is allowed to stand.

ARGUMENT

Prior to and following *Brown*, the federal courts made some efforts to open the doors of formerly all-white higher education institutions to "qualified" minority students.[16] This Court, however, has never actually examined the dimensions of the problem created by decades of no higher educational opportunities for African Americans followed by drastically inferior opportunities and mandatory segregation throughout the Southern and border state systems of higher education.[17]

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[16] *See, e.g., supra* note 1.

[17] As late as 1940, seventy-seven percent of the nation's African American population resided in the seventeen southern and border states and comprised twenty-two percent of the region's population. But the ten million African Americans in the region received less than four percent of (continued...)

The Court has not explored the necessity for remedies to eliminate the vestiges of those higher education systems in the same way that it has for elementary and secondary schooling in the series of decisions from *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), to *Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630 (1991). It is necessary and appropriate that the Court address these issues in this case.[18]

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[17](...continued)
the federal land grant monies allocated to these states. Overall these African American citizens were limited to colleges receiving just over five percent of total expenditures for public higher education. In eight states, accounting for forty percent of all African Americans in the nation, there were no accredited public colleges available to persons of African descent. *Kujovich, supra* note 9 at 98-101.

[18] It is essential that the Court fully hear this case and not limit the grant of the private plaintiffs' petition to specified questions. This will ensure that the Court has the benefit of a thorough discussion of all record facts and evidence that will be useful in considering the legal questions presented. Additionally, this will provide the Court the flexibility to determine after briefing on the merits and oral argument whether it is necessary to decide all issues.

Not only is there a conflict in the circuits,[19] legal error by the court below,[20] and broad impact[21] as explained in the

[19] The decision of the Fifth Circuit *en banc* in *Ayers* conflicts with the Sixth Circuit decision in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986).

[20] The standard applied in school desegregation cases heretofore has been one where the state actor has an affirmative duty to dismantle the formerly *de jure* segregated system "root and branch," by eliminating all vestiges of the dual system to the extent practicable. *See Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630 (1991); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); Revised Criteria for Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education, 43 Fed. Reg. 6658 (Feb. 15, 1978). While the methods of desegregating or eliminating the vestiges of past discrimination in higher education systems will be not be identical to those employed in elementary and secondary school systems, the obligation of a state with a *de jure* history to eliminate those vestiges is just as exacting in higher education as it is at the elementary and secondary level. *See Ayers v. Allain*, 914 F.2d at 692 (Goldberg, J., dissenting); *id.* at 693 (Higginbotham, J., concurring in part and dissenting in part); *Geier v. Alexander*, 801 F.2d at 802; *Geier v. University of Tennessee*, 597 F.2d 1056, 1065 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979); *United States v. Louisiana*, 692 F. Supp. 642, 653-58 (E.D. La. 1988) (*per curiam*, three-judge district court), *order vacated*, 751 F. Supp. 606 (E.D. La. 1990) (pursuant to *Ayers*); *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 474-75 (M.D. Ala.) (*per curiam*, three-judge district court) (state colleges have an "affirmative duty to effectuate the principles of *Brown*"), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967). *See also Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (decree "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'" [citations omitted]); *United States v. Louisiana*, 380 U.S. 145, 154 (1965) (remedy should be shaped "so far as possible to eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

petitions for *certiorari*, but the special and important nature of this case to the Nation's history and its will to correct serious constitutional wrongs justifies granting the writ.

With respect to higher education, the Court is in much the same position now as it was in 1954 with respect to elementary and secondary education. At that time, in *Brown*, the Court said:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
>
> Today, education is perhaps the most important function of state and local governments. . . . It is

[21] The impact extends beyond the states of Mississippi, Louisiana and Alabama, which are all currently involved in litigation. Numerous other state systems, including Maryland, Kentucky, Texas, and Pennsylvania, are pending before the Department of Education, Office for Civil Rights, for a determination whether they have satisfied their duty to dismantle formerly *de jure* segregated systems of higher education. A determination from the Court of the proper standard would apply to these states in administrative proceedings as well.

> required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

347 U.S. at 492-93.

In the thirty-six years since *Brown*, a college education has become a necessary prerequisite, not only to attain upper level jobs, but for basic employability in large numbers of positions with employers that increasingly require a highly skilled and intelligent workforce. As the three-judge district court stated in *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988):

> In vast, ever-growing segments of the American workforce, a high school diploma is not enough; a college education is often more critical than a high school education. The argument that the State requires students to attend primary and secondary school but cannot, or at least does not, require them to attend college fails to acknowledge the realities of our nation today. The purpose for a State's broad police power to enact truancy and other regulatory school laws . . . is to promote an educated, self-supporting citizenry that can effectively and intelligently participate in our society. . . . [T]hese underlying interests of American society are what compel persons to seek higher education on their own volition. If blacks and other minorities are to

> compete in the market place for more attractive and higher paying jobs in business and industry and to avail themselves of the benefits of corporate affirmative action programs, they need a college degree.

Id. at 656-57 (citations omitted).

Because higher education has become a public necessity today much in the same way that elementary and secondary education had become a public necessity by 1954, it is essential that every citizen have access to higher education free from the vestiges and limitations posed by past and continuing racial discrimination and segregation.

At a time when progress in attaining that goal is just beginning, the *Ayers* decision erects a solid barrier to further advancement. The Fifth Circuit's finding of compliance where a state has done nothing but adopt "good faith, race-neutral policies,"[22] simply *locks in* existing, very substantial vestiges of past discrimination and segregation. It is ironic

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[22] Mississippi falls short of even that low standard given its discriminatory use of ACT scores and mission designations.

that this barrier to further progress has been erected for Mississippi, Louisiana, and Texas,[23] several of the states that have been the most resistant to desegregating their higher education systems.

The *Ayers* decision is contrary to this Court's requirement that affirmative and effective measures be used to dismantle segregated school systems.

> [W]here a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Education, . . . the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system, . . . that is, to eliminate from the schools within their school system 'all vestiges of state-imposed segregation.'

Keyes v. School District No. 1, 413 U.S. 189, 200 (1973) (citations omitted). "Any other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

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[23] Texas operates under a desegregation plan entered with the Department of Education but also has been sued by private plaintiffs under state law in *League of United Latin American Citizens v. Clements*, No. 12-87-5242-A, filed December 2, 1987 (107 Dist. Ct., Tex.).

If left intact the *Ayers* decision will assure that the consequences of the serious and longstanding constitutional violations in the critical area of higher education will continue uncorrected and with incalculable harmful effects on the lives of African American citizens.

CONCLUSION

For these reasons, LDF urges the Court to grant both petitions for writ of *certiorari*.

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